Nos. 95-1858
96-110

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DENNIS VACCO, Attorney General
Petitioner

v

TIMOTHY QUILL, M.D. (and others)
Respondents

STATE OF WASHINGTON
Petitioner

v

HAROLD GLUCKSMAN
Respondent

ON CERTIORARI TO THE SECOND AND NINTH CIRCUIT COURTS OF APPEAL

BRIEF OF AMICUS CURIAE WAYNE COUNTY, MICHIGAN, IN SUPPORT OF THE PETITIONERS

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STATEMENT OF THE QUESTION

IS THERE IS A DUE PROCESS RIGHT TO COMMIT SUICIDE, ATTEMPT SUICIDE, OR ASSIST IN A SUICIDE, THOUGH THE CONSTITUTION HAS NOTHING TO SAY ABOUT THE SUBJECT?

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INTEREST OF THE AMICUS

Amicus is the County of Wayne. The Wayne County Prosecutor's Office has litigated the issue presented in the cases before the Court throughout Michigan courts, both trial and appellate, and the Michigan Supreme Court has found that there is no due process constitutional right to "assisted suicide." Further, Michigan has been the site of over 40 assisted suicides, and the Michigan legislature is awaiting the outcome of the instant cases before determining how to proceed with regard to future legislation in this area. The result in these cases is of great interest and importance to the County of Wayne.

WHETHER "ASSISTED SUICIDE" SHOULD BE PERMITTED IS A QUESTION LEFT BY THE CONSTITUTION TO THE POLITICAL BRANCHES OF GOVERNMENT, AND TO EACH STATE TO DECIDE FOR ITSELF.

I. The Framework of Review

The starting point for all analysis of the constitutionality of a statute is that the constitutionality of the law in question "is to be presumed, because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the constitution upon their action, have adjudged that it is so." Thomas Cooley, Constitutinal Limitations, at 183. See also People v Collins, 3 Mich 343, 349, 405 (1854); People v Gansley, 191 Mich 347 (1917) ("courts in a long series of cases have enunciated the principle that the presumption is in favor of the constitutionality of a statute"). This may

seem a commonplace, but, as Justice Cooley observed elsewhere in his treatise regarding another maxim of construction, while it may "seem so obvious a truism that one expects to see it universally accepted without question" nonetheless it "frequently becomes necessary to re-declare this fundamental maxim." Cooley, at 59.

Because of this presumption of constitutionality, and also because resolution of a challenge to the constitutionality of a statute is "one of the most grave and delicate duties which a judicial tribunal can be called upon to perform," Collins, at 347, Cooley, at 182, Justice Cooley wrote that "when courts are called upon to pronounce the invalidity of an act of legislation...they will approach the question with great caution...and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond a reasonable doubt.

A reasonable doubt must be solved in favor of the legislative action, and the act be sustained.....'It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt.'" Cooley, at 182-183, quoting Ogden v Saunders, 12 Wheat 270 (1827). See People v Stambosva, 210 Mich 436, 441 (1920) (the rule is that "every intendment is to be taken in favor of the propriety and validity of legislative action, and that in case of doubt courts should not interfere to thwart the legislative will").

Of course, it is also a truism that a court may not invalidate a statute because the court believes it "unjust and oppressive," or because "it is supposed to violate the natural, social, or political

rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed by the constitution." Cooley, at 164. This is so because in exercising the authority to declare a statute unconstitutional judges are not claiming judicial supremacy; rather, "they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law." Cooley, at 160 (emphasis added).

In examining the constitutionality of a statute, the meaning of the constitutional provision against which the statute is to be measured is obviously of critical

importance. The foremost maxim of construction is that "The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it." Cooley, at 55 (emphasis in the original). This method of construction is a part of our jurisprudential history. The court is to "declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." Cooley, at 55. As Justice Campbell put it in People v Blodgett, 13 Mich 127, 138 (1865): "The meaning of our constitution was fixed when it was adopted, and the question which is now before us is not different from what it would have been had the constitution been recently adopted....Constitutions cannot be changed

by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of government, until they are amended or abrogated by the action prescribed by the authority which created them." See also Justice Scalia, concurring in Minnesota v Dickerson, 124 L Ed 2d 334, at 348 (1993): it is a "fundamental principle of constitutional adjudication that the terms in the Constitutin must be given the meaning ascribed to them at the time of their ratification." This does not mean that the constitution is "static" in that it cannot be applied to unforeseen events or developments (such as modern technology)--surely, its principles can be applied to new situations, as Justice Campbell recognized over 125 years ago: "That the constitution means nothing now that it did not mean when it was adopted, I regard as true beyond doubt. But it must be

regarded as meant to apply to the present state of things as well as to all other past or future circumstances." Blodgett, at 140 (emphasis added). But the principles do not change--the constitution does not change to meet the times--the constitution is simply capable of application to new circumstances.

II. THE DUE PROCESS QUESTION

> "...there is simply no avoiding the fact that the word which follows "due" is "process"....we apparently need periodic reminding that 'substantive due process' is a contradiction in terms--sort of like 'green pastel redness.'"
>
> John Hart Ely, Democracy and Distrust (Harvard University Press, 1980), p.18.

The Analytical Approach

> "Well, what may seem like the truth to you," said the seventeen-year-old bus driver and part-time philosopher, "may not, of course, seem like the truth to the other fella, you know."
>
> "THEN THE OTHER FELLOW IS WRONG, IDIOT!"
>
> Philip Roth, The Great American Novel (1973), p.19.
>
> "...it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree....Otherwise a constitution...would be become the partisan of a particular set of ethical or economical opinions, which by no means are held semper ubique et ab omnibus.
>
> Otis v Parker, 187 US 606, 47 L Ed 326 (1902) (Justice Holmes, for the Court)

The attack on the prohibition on assisted suicide generally proceeds by a series of logical progressions, essentially as follows: 1)the Constitution prohibits deprivation by the Government of an individual's life, liberty, or property without Due Process of law; 2)a concept of "personal autonomy" may be located within

the "liberty" protected by the Constitution; 3)that concept of personal autonomy includes a person's ability to control his or her own body--to make "basic decisions regarding bodily integrity"; 4)that ability to control one's own body and make basic decisions regarding bodily integrity includes the liberty to terminate one's life; 4)a prohibition on the liberty interest of self-destruction is therefore unconstitutional (rather than subject to deprivation only upon "Due Process"). It is more than passing strange that under the Due Process Clause one's very life may be taken by the Government, certainly against his or her will, so long as fair procedures are employed, but an alleged aspect of one's right to liberty may not, no matter what the procedure. How can this be? From where does this liberty interest arise that is superior to one's right to live?

One thing is clear: an "undeprivable

even with Due Process" right to liberty/personal autonomy/control of one's body/to commit suicide (and to assist someone in so doing) can be found neither in the text of the Constitution, nor in the history of our Nation, which has never countenanced assisted suicide. It comes, rather, from the belief of those who think it the right, or correct, or moral thing, and must be "constitutionalized" by them to protect it against those to whom it "may not, of course, seem like the truth," because those people, even if they happen to include the democratically elected lawmakers of the society, are simply wrong.

This approach, of course, allowed Chief Justice Taney to declare that there could be no valid law against slaveholding in the United States, slaveholders having a liberty (as well as property) interest in owning slaves with which the Government could not interfere. How did Chief Justice Taney know

this liberty interest existed, it not being stated in the Constitution? He knew it because he was passionately convinced that it must be so. Dred Scott was not decided on the basis of history and tradition giving rise to a liberty interest in slave holding, as history and tradition would not support such a finding, slavery being prohibited in much of the country. It was the prevention of action by the democratically elected legislature--a ursupation of authority by the judiciary--by proclaiming that the legislature was without power to ban slavery in the territories through the finding of a liberty interest in the slave holder which helped precipitate the Civil War. Dred Scott was decided on the Respondents' defendant's theory of constitutional adjudication; that is, that the Constitution is an empty vessel into which the judiciary may pour whatever meaning it chooses, the object of the parties to constitutional

disputes being to convince the court as to which side has the better moral philosophy.

Respondents can offer no principle by which statutes prohibiting assisted suicide may be overturned which would in any way serve as a check on the personal predilections of the judiciary. In short, the approach of the Respondents and the courts below is simply moral philosophy, attempting to engraft a particular moral philosophy into the Constitution, and as Professor Ely has said, "our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles, at least not a set that could plausibly serve to overturn the decisions of our elected representatives." Because history and tradition demonstrate that there is no constitutional right to assisted suicide does not disable the legislature from deciding to allow the practice. It is a finding of

unconstitutionality which freezes tradition and history, which ends debate on the matter, not a finding of constitutionality, which allows the democratic process to continue to work.

The Constitution not properly being a flag to be captured by whomever can persuade a majority of Justices as to their view of moral philosophy, thereby completely shutting out competing views, what approach is to be taken as a matter of law and not philosophy to identification of liberty interests? Palko v Connecticut, 302 US 319, 82 L Ed 288 (1937) demonstrates the method.

Today, the doctrine of "selective incorporation" of the Bill of Rights has captured the field as to most of the rights protected by the Bill of Rights, so that it is held that the "Due Process" required by the 14th Amendment of the States includes most of the Bill of Rights. But before selective incorporation there was Palko, and

the approach of Palko is still valid with regard to claims of liberty interests or procedural protections not contained within the Bill of Rights. In that case the defendant was found guilty of murder in the second degree after a trial for first degree murder, and the state appealed, as was allowed under Connecticut law. On appeal it was found that error had been committed in excluding the defendant's confession, in excluding testimony to impeach his credibility, and in instructing the jury on the difference between first and second degree murder. Palko was retried, convicted of first degree murder, and sentenced to death. He claimed that jeopardy precluded the retrial which he had not sought.

Because the Bill of Rights, and therefore the jeopardy provision, was not (then) applicable to the States, the Court looked to the Due Process Clause of the 14th Amendment to see if the practice of

Government appeal and retrial offended that clause. The Court stated that those protections which may be found to be "implicit in the concept of ordered liberty" are applicable to the States through Due Process requirements. A liberty interest or procedural protection exists if "so rooted in the traditions and conscience of our people as to be ranked fundamental." In the case before it the Court concluded that because the state was not "attempting to wear the accused out by a multitude of cases with accumulated trials," but instead asking only that "the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error," this was not "cruelty at all"; indeed, to allow the state an appeal with regard to trial error was, said the court, "no seismic innovation. The edifice of justice stands, in its symmetry, to many, greater than

before." 82 L Ed at 293-294.

As stated, the total incorporation/selective incorporation/no incorporation struggle with regard to the Bill of Rights has ended with the victory of selective incorporation, but for claims outside the Bill of Rights the Palko approach remains viable. Michael H. v Gerald D., 491 US 110, 105 L Ed 2d 91, 109 S Ct 2333 (1989) illustrates the point. The petitioner maintained an adulterous relationship with a married woman who was cohabiting with her husband, and a child was born, which was almost certainly his. The mother reconciled to her husband, and state law conclusively presumed that the issue of a wife cohabiting with her husband, who was not impotent or sterile, was the child of the marriage. The purpose of the statute was to protect the privacy and integrity of the family; the petitioner, however, wished to establish visitation rights with the

child, which he could only do by establishing paternity, which the law precluded. He claimed that the state statute was unconstitutional because he had a liberty interest in his relationship with his child.

The Court rejected the claim. The plurality opinion observed that the Court itself had previously expressed concern regarding the recognition of "new" liberty interests under Due Process claims, "lest the only limits to...judicial intervention become the predilections of those who happen at the time to be Members of this Court." Moore v East Cleveland, 431 US 494, 52 L Ed 2d 531, 97 S Ct 1932 (1977). As Justice White observed in dissent in Moore, "the present construction of the Due Process clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers..., the Court should be extremely reluctant to breathe still further

substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority."

The approach cannot be one of personal predilection then, said the Court, so that "we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental'...but also that it be an interest traditionally protected by our society," that it be "rooted in history and tradition." (emphasis supplied, 105 L Ed 2d at 105). Finding that the relation between persons in the situation of the petitioner and his child had not been protected under our historic practices (indeed, the historic tradition is the other way, to protect the integrity and privacy of the family), the Court rejected the claimed liberty interest.

See also Bowers v Hardwick, 478 US 186, 92 L Ed 2d 140, 106 S Ct 2841 (1986).

Moore v East Cleveland, cited above, itself also demonstrates the appropriate method. A housing ordinance limited occupancy of dwellings to members of a single family, and defined "family" as essentially only the "nuclear" family. A woman was convicted of violating the ordinance because she lived with her son and two grandsons, and the grandsons were not brothers but cousins. In dissent from the finding of unconstitutionality of the ordinance, Justice White expressed the concerns above noted regarding judicial usurpation of legislative authority under the auspices of the Due Process Clause, based on nothing other than the predilections of the Justices. Justice Powell, the author of the lead opinion, also appreciated this concern, agreeing that "there are risks when the judicial branch

gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights....there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court....history counsels caution and restraint." How, then, to avoid decisions based only on a particular moral philosophy embraced by a majority of Justices? Justice Powell supplied the answer: "Appropriate limits on substantive due process come...from careful 'respect for the teachings of history (and) solid respect for the basic values that underlie our society.'" 52 L Ed 2d at 540. Addressing Justice White's dissent directly, Justice Powell stated that defining the substantive content of liberty interests to be found in the Due Process Clause by looking to "history and tradition" imposes "meaningful

limits" on the judiciary. 52 L Ed 2d at 540, fn 12 (emphasis added). While reasonable people may at times disagree as to what history and tradition demonstrate, at least they are engaged in the same enterprise, and where history and tradition point in a certain direction, judges are not free to disregard it in favor of their own views of moral philosophy or ethical values.

Cruzan v Director, Missouri Department of Health,, 497 US 261, 111 L Ed 2d 224, 110 S Ct 2841 (1990) in no way supports the circuit courts' usurpations of legislative authority; indeed, read properly, it virtually compels the opposite conclusion. The claimed liberty interest there was a right to refuse life-sustaining medical intervention, and more precisely, whether the decision of the State that it must be demonstrated by convincing evidence that the individual who is being treated would desire the cessation of treatment was

constitutional. The Court looked again to history and tradition. It is in our tradition that the touching of another person, including through medical treatment, without permission, or "informed consent," is a battery, which can lead to damages. As the Court observed, the "logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment." 111 L Ed 2d at 236. The Court specifically declined to view the matter as involving a generalized constitutional right of privacy, analyzing the question instead in terms of a liberty interest to avoid unwanted touching or intervention upon one's body, and looking to history and tradition. The Court concluded in the end that this liberty interest can be regulated by the State with process that is "due," and held that requiring a showing of convincing evidence was not improper, or "undue." On

its way to this conclusion the Court discussed the State's interest in the matter, noting in support of the State's interest that "the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide." 111 L Ed 2d at 243. How possibly could the Court have looked to the fact that the majority of states have laws imposing criminal penalties for assisted suicide as a factor in favor of the State's interest on the issue of terminating medical care if those state laws are in fact unconstitutional? Cruzan provides no support for the circuit court decisions, but mandates the conclusion that theyerred egregiously.

The Casey Decision

Respondets, as well as the circuit court decisions, rely heavily on the triune joint opinion in Planned Parenthood v Casey, 120 L Ed 2d 674 (1992). The decision,

however, plays them false. Casey, albeit in a way previously unknown in jurisprudence, "retained" the "essential holding of Roe v Wade...." (retained in a way previously unknown in jurisprudence in that the joint opinion also modified the "essential" holding of Roe v Wade, see Justice Scalia, dissenting, at 120 L Ed 2d at 791: "I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version" of stare decisis). The opinion threw out the trimester approach of Roe in favor of a viability approach; that is, it held that the State may absolutely prohibit abortions, save when necessary to save the life or health of the mother, after fetal viability. Thus, once the fetus has attained the degree of development that the Court is willing to recognize as "life," the interest of the State in protecting life outweighs the interest of personal autonomy, so that the State may prevent the abortion.

See 120 L Ed 2d at 710. Even before viability, the State's "profound interest" in what the opinion called "potential life" allows regulation, so long as an undue burden is not placed on the decision to obtain an abortion, an "undue burden" being a provision of law the purpose of effect of which is to place a "substantial obstacle" in the path of a woman seeking an abortion "before the fetus attains viability." 120 L Ed 2d at 715. At viability, however, the State's interest overtakes the individual liberty interest created in Roe, and nontherapeutic abortions may be prohibited.

This does not advance the respondents' cause, for even abortion law, then, recognizes an overwhelming State interest in protecting life that has reached that form which the Court is willing to recognize, which, in the case of a fetus, is viability, that state of development where the fetus could survive outside the womb. If the

State's "profound interest" in protecting life overtakes the right of liberty created in Roe, how can it possibly be said that it ends at some point after birth? The interest of the State is surely at least as profound after birth as at viability, as history teaches. The only possible answer of the respondents is that life may reach a point where it should not be considered life--it should be defined "out of" life--for it has become "not worth living." But this question of moral philosophy is one to be debated before legislatures, not one for the imposition of a particular answer by judges, and history teaches that the concept of a life not worthy to be lived is a dangerous notion indeed. Casey supplies no succor to respondents.

Tradition and Assisted Suicide

Do, then, our traditions and our history recognize a right to suicide, and to assist another in its commission (leaving

aside whatever the history and traditions of other nations, such as Greece and Rome, reveal)? Clearly not, as the Court of Appeals recognized. In England, suicide was a form of common law murder, described as either self-murder, see 3 Coke, Institutes Of The Laws of England 54 (1797), 4 Blackstone, Commentaries 189, or the decedent being deemed "the murderer of himself." W Clark and W Marshall, A Treatise On The Law of Crimes, sec. 10.03, at 623 (7th Ed, 1967). It was punishable by burial in the highway with a stake through the suicide's body and forfeiture of all his goods to the crown. According to Blackstone, common law felonious homicide occurred "when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." Blackstone specifically stated that murder may be

"either by killing one's self, or another man." 4 Blackstone, Commentaries, 188, 195.

Suicide is no longer considered criminal, but not because the act does not fall within the definition of murder, but because no punishment is provided for self-murder. Forfeiture of all property and burial in the highway with a stake through the suicide's body is no longer considered appropriate. This change was accomplished not to legitimize the act of suicide, but to spare the family of the suicide. See e.g. Kamisar, "Are Laws Against Assisted Suicide Unconstitutional," Hastings Center Report 23, no. 3, p.32 (1993). However, aiding a suicide still falls within the common law definition of murder, and, where there is no other specific offense for the crime of assisted suicide, is therefore punishable according to the ordinary statutory penalties. The position taken by some that because neither suicide nor attempted

suicide are criminalized that it is therefore "logically incomprehensible" to charge a person with aiding and abetting a "lawful act," is wholly unpersuasive; indeed, Professor LaFave has derided the view that because suicide is no longer punished assisted suicide is also not criminal as "most certainly unsound." 2 LaFave and Scott, Substantive Criminal Law, sec. 7.8(c), at 249 (1986). The most celebrated model code with regard to criminal law, the Model Penal Code, not only prohibits assisted suicide in sec. 210.5, but grants a privilege to those who use force to prevent a suicide. See sec. 3.07(5). The Code was drafted after years of study, by the most eminent criminal law scholars, and itself is proof that there has not existed a historically recognized right to commit suicide or to assist in a suicide. See Kamisar, at 33.

Moreover, at the time of the ratification of 14th Amendment 21 of the 37 existing states, and 18 of the 30 ratifying states, prohibited assisted suicide. And even those states which had not spoken to the issue in 1868 held that assisted suicide was unlawful when the issue was faced. See Marzen, O'Dowd, Crone, and Balch, "Suicide: A Constitutional Right?," 24 Duquesne L Rev 1, 76-100, 148-242 (1985). It can readily be said that there is no significant support whatever for any claim that a right to suicide, or to assist in suicide, is "so rooted in our tradition that it may be deemed fundamental or implicit in the concept of ordered liberty."

There is not in this country, then, a tradition protecting suicide or assisted suicide. The question is one for the political branches of government.

Conclusion

> "It is precisely historical practices that define what is 'due.' 'Fundamental fairness' analysis may appropriately be applied to departures from traditional American conceptions of due process; but when judges test their individual notions of 'fairness' against an American tradition that is deep and broad and continuing, it is not the tradition that is on trial, but the judges."
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> Justice Scalia, concurring in Schad v Arizona, 115 L Ed 2d 555 (1991)

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* See Alexander Bickel, The Supreme Court and The Idea Of Progress (Yale University Press: 1978), p. 84: "The independence of the judges is an absolute requirement if individual justice is to be done....But supreme judicial autonomy, the judge answerable only to his own conscience in making policy for the society, in adjusting, conformably to one or another choice of values, the conflicting interests, desires, and ethical and moral aspirations and preferences of the groups that constitute the society--that is something else again...."

The claim that assisted suicide is protected by the Due Process Clause fails as a matter of history and tradition, and fails in its attempt to broadly state the right as a right of "personal autonomy," which does not exist. There are particular rights of personal autonomy, such as the right not to be seized under the Fourth Amendment absent probable cause or reasonable suspicion, but a general right to personal autonomy is a right to be free of all law. The line-drawing the decisions of the circuit courts would require is classic judicial legislation. If there is a right to personal autonomy which includes a right to self-destruction, how can it possibly be limited? Why would not a person simply tired of life have a right to "blow his brains out" or drown him or herself without interference by the state? And if there is a right of personal autonomy, which includes

the right to control one's own body and make basic decisions regarding bodily integrity, why does it not include a right of consenting adults to engage in acts of incest? Why does it not include the right of a competent minor to engage in sex with an adult (how can statutory rape exist as a crime where the act is consensual?). Why does it not include the right to polygamous marriages? Why does it not include the right to take psychotropic drugs for recreational purposes? Why can an individual who causes harm to him or herself be committed to an institution as a threat to him or herself?

The "right" which has been invented by the circuit courts here is rife with line-drawing impossibilities. Could it possibly be plainer that if a right of "personal autonomy" as recognized by the circuit court exists then then a right to suicide must include all of "us"--it cannot

be said that it does not extend to those that are suffering physical pain but are not terminally ill, that it does not extend to those that are suffering "psychic" pain but are not physically ill at all, that it does not extend to anyone for any reason whatsoever. Further, any attempt at linedrawing necessarily involves the government in determining whether a life is "worthy to be lived." If the right is invented and limited to the terminally ill, when does it come into being? We are terminal from the moment of conception; when a specific illness has overtaken us, so that our death is reasonably predictable, does the "right" exist 3 months from death, 6 months from death, one year from death, five years from death? Does it not exist for those who are terminally ill, but who are not suffering great pain, and who determines whether pain is being suffered, and its degree? If the "right" belongs only to the

terminally ill who are suffering, by whatever standard, how can it be denied to those who are suffering "psychic" pain? How can a court possibly arrogate to itself the right to tell these people that though "The power to determine the limits to which one can endure pain and agony is certainly intrinsic to this basic concept of personal autonomy," it does not belong to them, so that rather than being treated (as many are, to full recovery) they should simply be assisted in achieving their deaths. As Professor Kamisar has observed, "if a competent person comes to the unhappy conclusion that his existence is unbearable and freely, clearly, and repeatedly requests assisted suicide, why should he be rebuffed because he does not 'qualify' under somebody else's standards? Isn't this an arbitrary limitation of self-determination and personal autonomy? 'How,' asks Daniel Callahan, 'can self-determination have any

limits? Why are not the person's desires or motives, whatever they be, sufficient?'" Kamisar, at 37. The People have simply not spoken on this question through the Constitution, and thus it is for the legislature.

Moreover the concern, expressed by Professor Kamisar, that "In a climate in which suicide is the 'rational' thing to do, or at least a 'reasonable' option," that it will "become the unreasonable thing not to do? The noble thing to do?....how likely is it that an old or ill person will be encouraged to spare both herself and her family the agony of a slow decline, even though she would not have considered suicide on her own?" is certainly legitimate. In this vein, amicus would point out that time and again the enactment and application of prohibitions on assisted suicide has been compared by one practitioner of this assistance to "Germany in the 1930's and

1940's," it being said that officials there and then also said they were "just following the law." This is bad logic, bad law, and bad history. Atrocities occurred in Germany not because people "followed the law," but because the law broke down; the nation of Germany was ruled by the cult of personality, by one who thought his notions of moral philosophy superior to all others, and who had the military power to put his philosophy into action. Those who committed atrocities in his name did not "follow the law," they followed orders. It was the suppression of democracy in favor of a "power elite" which was, in its view, above the law, which led to the Holocaust.

An article published in 1949 is also instructive in this regard. The article is "Medical Science Under Dictatorship," 241 New England Journal of Medicine 40 (1949). The article examines the question of how respected men of science--physicians--could

have engaged in atrocities under Nazi rule. The article, being published in 1949, has nothing to do with assisted suicide, not being written by a "partisan" of one side or the other of this question of moral philosophy and policy, but being concerned with physician atrocities during the War. The author concluded:

> Whatever proportions these crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings. The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. It started with the acceptance of the attitude, basic in the euthenasia movement, that there is such a thing as life not worthy to be lived. This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted and finally all non-Germans. But it is important to realize that the infinitely small wedged-in lever from which this entire trend of mind received its impetus was

> the attitude toward the nonrehabilitable sick.

241 N Eng Jrnl of Med at 44 (emphasis added).

As stated earlier, Justice Cooley long ago correctly observed that in exercising the authority to declare a statute unconstitutional judges are "only the administrators of the public will. If an act of the legislature is held void, it is not because judges have any control over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law." Cooley, at 160 (emphasis added). History clearly teaches us that the people have not expressed their will in the constitution that assisted suicide be protected, and there is thus nothing in the constitution which is paramount to the decision of the people's elected representatives, in our

constitutional democracy, to continue to prohibit it.

The "right" sought to be pounded into the Constitution by the lower courts simply cannot be found there, but is one which must be sought in the political arena, there being no principled basis upon which to locate it in the Due Process Clause. It can only be found there when judges assert their personal and individual predilections as being law. To conclude by reiterating Professor Ely: "...reasoning about ethical issues is not the same as discovering absolute ethical truth...our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles, at least not a set that could plausibly serve to overturn the decisions of our elected representatives." This court should reverse the circuit courts.

Epilogue

"...(suppose) a statute making it a crime for any person to remove another person's gall bladder, except to save that person's life. Surely....that has to be unconstitutional...."

"I don't think that law is unconstitutional....If it passed, I think we could get it repealed pretty quick."

"What if we couldn't?"

"Then I'd suppose my elected representatives had found something about gall bladders that you and I are unaware of."

"Suppose they hadn't. Suppose they were just acting crazy."

"Vote them out. Impeach them. Repeal the law."

"Can't. Most people believe they're doing the right thing."

"And they're just acting crazy too?"

"Right."

"I don't suppose we can reason with them?"

"Nope."

"You know what you're telling me? That you don't believe in democracy."

Ely, at 182 (emphasis added).

RELIEF

Wherefore, amicus respectfully submits that the circuit courts should be reversed.

Respectfully submitted,

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